No. 12204.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WALTER FIELDS and ADEL C. SMITH,

Appellants,

vs.

HARRIET V. FIELDS,

Appellee

BRIEF FOR APPELLANTS, WALTER FIELDS AND ADEL C. SMITH.

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Opinions of Court Below.

The Court rendered a written opinion, and later a written supplemental opinion. Both are found in 81 Fed. Supp., pages 54-62. They are also found on pages 24 and 52 of Clerk's Transcript.

Jurisdiction.

This is an action in interpleader. Federal jurisdiction rested upon the diversity of citizenship of the parties. Judicial Code, Sec. 24; 28 U. S. C. A., Sec. 41.

Law Involved.

The laws of New York governing separation agreements between husband and wife domiciled therein. The due process and equal protection provisions of the Fourteenth Amendment of the Constitution of the United States, and Sections 158 and 159 of the Civil Code of California, relating to the acquisition of community property. Also the relinquishment of such property rights under the laws of California and New York.

Questions Presented.

1. Was the premium on the life policy in question paid by William C. Fields from the community earnings of himself and Harriet V. Fields, his wife?

2. Whether a separation agreement made and fully executed under the laws of the State of New York, a common law state, prevents the acquisition of a community property right by the wife in the husband's earnings during the life of such contract.

3. Whether under the facts and circumstances shown in the record a relinquishment on the part of the wife to any community property claim she might otherwise have had was made by her prior to the payment of the premium on the life policy in suit.

Statement.

On December 15, 1947, Penn Mutual Life Insurance Company filed its complaint in interpleader herein against appellant and appellee. [Clk. Tr. p. 21.] This complaint was sustained by the Court and the balance on hand of the proceeds of an annuity and death benefit policy on the life of William C. Fields, amounting to $12,882.32 was paid into the registry of the Court. Appellants were named as beneficiaries in said policy and theretofore had received approximately one-half the death benefits payable under it.

Both appellants and appellee filed answers to the interpleader action, claiming said sum so paid into the Court as above set forth. Appellants contend that the premium of said policy was paid from the separate property, and appellee contends that it was paid from the community earnings of her and the decedent. [Clk. Tr. pp. 10 and 18.]

The policy in suit was a single premium policy of $26,500.00 and was dated March 8, 1934. The payment of the premium was paid in full on said date. The cause was tried on September 21-23, inclusive, 1948, and the supplementary hearing was held on November 22, 1948. [Rep. Tr. Supp. p. 4.] The Court made findings of fact and conclusions of law. So far as this appeal is concerned only two of the findings of fact need be mentioned. They are as follows [Clk. Tr. p. 58]:

"V.

"It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields.

"VI.

"It is true that the payment of the sum of $26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift of the community property of William Claude Fields and Harriet V. Fields."

Judgment passed for appellee for all of said monies, pursuant to these findings. [Clk. Tr. p. 59.]

Walter Fields and Adel C. Smith appealed from the whole of said judgment. [Clk. Tr. p. 61.]

The sole question involved here is the character of the earnings of William C. Fields, from which this policy premium was paid.

William C. Fields died testate in the County of Los Angeles, State of California, on the 25th day of December, 1946. The decedent and appellee had not lived to-

gether as man and wife, but had lived separately and apart since some unestablished date in the year 1907. [Rep. Tr. p. 6; Rep. Tr. Supp. p. 24.] William C. Fields claimed Philadelphia as his home prior to the year 1925. [Rep. Tr. pp. 118, 119.] He claimed Waterford Works, New Jersey, as his domicile from 1925 until he removed to California. When he established a domicile in California is a matter of considerable doubt. His tax returns, copies of which are Exhibits 8 to 31, Reporter's Transcript pages 143 to 182, contain the New Jersey address above mentioned as his domicile, until the tax return for the year 1937 was made, and in this return he specified California as his domicile. [Ex. 27, Rep. Tr. p. 181.] There was considerable evidence which conflicted with these tax returns and this evidence was held sufficient to overcome the statements made therein. The finding of the Court was that on March 8, 1934, and also when these funds were earned to purchase said life policy, the decedent was domiciled in California. We, on this appeal, realize that this Court would probably not disturb this finding of the trial court. [Clk. Tr. p. 57.] William C. Fields, and appellee, though living separate and apart for nearly 40 years, were never divorced. To determine the character of the funds used to purchase this policy, it is necessary to review the salient facts occurring during the period from the separation in 1907 until the death of the decedent on December 25, 1946.

William C. Fields, while a resident of Pennsylvania, intermarried with Harriet V. Hughes, a resident of New

York, in San Francisco on the 8th day of April 1900. [Rep. Tr. pp. 5, 6, 7.] They established a domicile soon thereafter in the State of New York. A son was born to them there in the year 1904. [Rep. Tr. p. 7.] They separated there in 1907, the exact date not being established. Appellee is vague and non-communicative as to the details occurring at the time of their separation. [Rep. Tr. p. 6; Rep. Tr. Supp. p. 23.] Suffice it to say that marital relations were never thereafter resumed. Some years after decedent established his domicile in California, the appellee also removed to this state [Rep. Tr. p. 8], but marital relations were never resumed in California, and each maintained a separate place of abode. [Rep. Tr. p. 215.]

The obligation of William C. Fields to support appellee was reduced to agreements, which were in some instances varied, sometimes up and sometimes down, but consisted of weekly payments made to her which she accepted as and for full payment of her claim for support. [Rep. Tr. Supp. pp. 29, 37, 39.] These facts were established by admission of appellee [Rep. Tr. p. 221; Rep. Tr. Supp. pp. 22 to 44] and also by a large number of letters, which were produced at the supplementary hearing and the digest thereof introduced in evidence. [Clk. Tr. p. 68.] The arrangement for support was made in New York and each and every payment thereof was made in New York either by the decedent personally, or by a New York bank acting as his agent. [Clk. Tr. p. 68.] For example, on

February 25, 1926, appellee wrote him this [Clk. Tr. p. 70]:

> "Thank you for the cheque for $65.00 (sixty five dollars) this week. Undoubtedly you made a mistake in sending $5.00 too much—however it will keep until next week."

On or about June 4, 1927, the decedent made arrangements with the Harriman Bank in New York to pay her $75.00 per week, concerning which she stated [Clk. Tr. p. 70]:

> "it is agreeable to me and satisfactory."

This continued some 6 or more years and was changed to the Guaranty Trust Company of New York on or about March 28, 1933. [Clk. Tr. p. 71.] This continued until his death on December 25, 1946, a period of 13 years at this bank. These payments were for $60.00 per week, except a slight variation on one or two occasions. These payments continued after both parties had removed to California, the bank arrangements were not in anywise altered. Appellee admits he supported her throughout the period remaining of his life. [Rep. Tr. Supp. p. 39.] An examination of appellee's testimony [Rep. Tr. Supp. pp. 22-45] confirms unmistakably the existence of a New York contract that was religiously fulfilled and performed by William C. Fields from the year 1907 to the date of his death. Finally, the terms of the contract were restated between them in 1938, when she made him a proposition to which he assented. [Rep. Tr. Supp. pp. 39-41.]

Motion to Reopen Cause.

In addition to the above and foregoing statement, appellants' attorney, John W. Preston, filed herein an affidavit in support of the motion to reopen the cause. [Clk. Tr. p. 48.] The facts set forth in the affidavit were discussed by the Court in its supplemental written opinion. [Clk. Tr. pp. 52, 54, 55.] Whether the Court considered them a part of the testimony in the main cause is not certain, but he characterized them as of no value to the inquiry. (81 Fed. Supp. p. 62.) These facts were statements by the tax agent and by the attorney of Mr. Fields that he said he had a property settlement agreement with his wife, that it was $60.00 per week, and was to continue for the period of the natural life of Harriet V. Fields. These statements are in exact accord with the letters from him to her under the date of January 13, 1944, in which he stated that he had paid her, "60 smackers per week" year in and year out for 40 years ($124,800.00). [Clk. Tr. p. 73.]

We shall insist that the hearsay rule has this exception, to wit: where intent behind an act is important, declarations of a decedent are admissible in evidence. His lips are here sealed and she occupies a point of great advantage if these declarations may not be received.

Specification of Errors.

Appellants will rely upon this appeal upon the following specifications of error, to wit:

"3. The District Court erred in holding that the funds used by decedent, William C. Fields, in the purchase of the single payment insurance policy involved in this case were community property.

"4. The District Court erred in holding that defendant, Hattie V. Fields, did not enter into a property settlement agreement with the decedent, William C. Fields, whereby she accepted payment of monthly sums for life in lieu of any claim or interest in the earnings and property of the said William C. Fields.

"5. The District Court erred in holding that Hattie V. Fields had, or has, any interest, community or otherwise, in the proceeds of said insurance policy.

"6. The District Court erred in holding that decedent, William C. Fields, while domiciled in the State of New Jersey, could not lawfully make a gift of the proceeds of the life insurance policy involved herein to his brother and sister, Walter Fields and Adel C. Smith, without the consent of his wife, Hatie V. Fields."

Summary of Argument.

I.

Appellants insist that on separation in New York appellee's sole right under New York law was support from his earnings.

Her common law dower right and any other special rights conferred on her after the death of William C. Fields would still exist, but her right during his lifetime in his earnings and personal property is settled by the fulfillment of his obligation to support her. In this case the obligation to support her was reduced to a mutual agreement made in New York and religiously performed in such state until the day of his death. This being true, no other right in his earnings existed during his lifetime.

On his death she has only the rights if a widow under the law of succession and other special statutes in California. During his lifetime she did not and could not have any existing community property right.

The change of domicile to California in the absence of a resumption of marital relations therein makes no change in the applicable laws of New York.

II.

Moreover, under the provisions of Civil Code of California, Sections 158, 159, coupled with the agreement above mentioned together with the conduct of the parties shows a relinquishment of her claim to the earnings of William C. Fields.

III.

Finally, if the evidence taken on the supplementary hearing is not to be considered evidence on the merits, then we shall contend that an abuse of discretion exists warranting a reversal of the judgment.

AUTHORITIES.

The Validity and Construction of the Contract Between Mr. and Mrs. Fields Are to Be Governed by the Laws of New York; but the Laws of California Control With Respect to the Remedy.

It is well settled rule of law that, as stated in 41 C. J. S. 595:

> ". . . the validity of a contract between husband and wife generally is governed by the law of the place where the contract was made; and matters relating to the remedy sought are governed by the law of the forum . . ."

And it is also well settled that:

> "The law governing the contractual relations between husband and wife is the law in force at the time of the alleged contract." (*Id.*, p. 596.)

See, also, "Conflict of Laws," Section 4, in 15 C. J. S. p. 858, where the text states:

> "In accord with the general rule as to the enforceability of foreign law and subject to the same exceptions, it is usually held that a contract valid under its governing law, discussed *infra* section 11, is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or unless the enforcement of the contract would violate the settled public policy of the forum, or unless it would work an injury to the state or its citizens."

This was held to be the rule in California, in *Mercantile Acceptance Co. v. Frank,* 203 Cal. 483, and *Hutchinson v. Hutchinson,* 48 Cal. App. 2d 12, even though the law

of the forum, if applied, would have determined otherwise. See, also, *Griffin v. McCoach,* 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, as among the later cases applying the rule.

In *Estate of Belknap,* 66 Cal. App. 2d 644, the Court held that a property settlement agreement, executed prior to divorce of the parties and providing that the husband would pay to the wife certain sums monthly for her life, was valid and enforceable against his estate, since by virtue of the agreement she was immediately vested with equitable title to the property interest therein provided for.

In effect, the same holding was made in *Higgins v. Higgins,* 121 Cal. 487. There, the parties entered into a separation agreement, providing an annuity to the wife for life, the same to constitute a lien upon the husband's estate. The agreement was held valid and enforceable against lands of the husband, although the locality of same had not been indicated, or specifically described, on the principle that "that is certain which is capable of being made certain."

More in point is the decision in *Alexander v. Alexander,* 158 F. 2d 429. Husband and wife entered into a separation and property settlement agreement in Missouri, which was to be performed in that state. Divorce action was filed in Msssouri by, and divorce was granted to, the wife. The ex-husband remarried and moved to Texas, where half of the earnings of a husband belong to his wife. Under the property settlement agreement, the ex-husband was to pay his former wife 20% of his gross income in excess of $7,500.00 per year, as further support and maintenance money. The question arose as to whether the laws of

Missouri or the laws of Texas were applicable. The Court said, at page 430:

> "Our problem, then, is to ascertain the sense in which the parties used this term in their contract. To do this, it is necessary not only to consider the subject matter of the contract, but also the place of its execution, because the place where a contract is executed 'governs its nature, validity, and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other place.' Gossard v. Gossard, 10 Cir., 149 F. 2d 111, 112. Admittedly, this is a Missouri contract. The parties lived in Missouri, the contract was executed in Missouri, and was to be performed there. It follows that the contract is to be interpreted under the Misosuri law."

The doctrine in the *Alexander* case is recognized in *Hammond v. Hammond*, 131 F. 2d 351, where the Court held that the construction of a separation agreement made in New York was governed by the laws of New York.

This *Alexander* case is of much further value to this inquiry. The husband after the separation agreement and the divorce removed and settled in the community property state of Texas. Under his contract with his former wife, he was to pay her twenty per cent (20%) of the excess over $7,500.00 per annum on his earnings. He claimed that under the law of Texas his new wife owned half his income, hence there was no excess. The Court denied this claim and the former wife's percentage was allowed on all and not half his income.

The principle underlying this case is the same as the case before the Court. There the husband tried to vary the contract made in Missouri by coming to Texas, and

here Hattie Fields tries to change the New York contract to a California obligation because he moved to California while the said contract was still in force.

The foregoing authorities show that separation and property settlement contracts are within the scope of the general rule laid down in 41 *C. J. S.* 595, and in 15 *C. J. S.* 858, *supra,* and constitute no exceptions thereto. In view of the principles announced, what is the law of New York?

It is the law of New York that a married woman has all rights in respect to property, real and personal and acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, as if she were unmarried. (*D. R. L.,* Sec. 51.) Her property is not subject to his disposal or liable for his debts. (*Id.,* Sec. 50.) The husband has the legal duty to support his wife. The wife may sue in her own right for her wages, earnings, compensation, etc., whether from another, or accruing from her own business. Husband and wife may contract with each other, and convey to each other, real property without the intervention of a trustee. The community property system does not obtain in New York. (*Martindale, N. Y. Digest.*) Except in the respects mentioned, it appears that the common law governs the rights and duties of the spouses. By the common law it is the duty of the husband to support the wife, unless she deserts him, and this appears to constitute her sole right in and to his earnings and personal property. (Dower rights are not involved, hence not included in this discussion.)

From the foregoing, it is apparent that, in New York, husband and wife may freely contract with each other in

respect to the property and earnings of either, or both, if any. This would appear to include relinquishment by either to the other of rights in such property and earnings, as one phase of the right to so contract. This general conclusion is fortified by at least two decisions of the New York Court of Appeals. (*Young v. Hicks,* 92 N. Y. 235, and *In re Burridge's Estate,* 261 N. Y. 225, 185 N. E. 81.)

In the case last cited, *supra,* the Court said in respect to a separation agreement in which provision was made for the support of the wife in lieu of her right to claim personal property from his estate, at pages 81, 82 (185 N. E.):

> "The parties here have not only agreed to live apart, but have determined the manner in which the husband shall meet his obligation to support his wife, and in return the wife has accepted the stipulated provision for her support in lieu of 'all other claim and provision for her support' as well as in lieu of her dower right. Nevertheless the obligation to support in some form continued during the husband's life, and the family bond was not entirely severed so long as mutual rights and obligations continued. The courts of this state have uniformly held that husband and wife constitute a family so long as the marital rights and obligations continue, regardless of agreement, express or implied, between the parties, as to the manner in which those obligations shall be performed.
>
> "The question remains whether the wife has voluntarily relinquished her right to claim the exemption.

We have held that a wife may do so effectually where she accepts other provision for her support in lieu of her right to claim personal property from his estate. Matter of Young v. Hicks, 92 N. Y. 235. Marital rights and obligations end with the life of either party to the marriage, but the state may still determine the division of their property after death. An agreement of a wife that she shall accept in lieu of other provision for her support a sum fixed by agreement, to be paid while both parties live and the husband's obligation to support continues, is fairly open to the construction that the wife still intends to retain such rights against the husband's estate after his death as the law has conferred upon her. The situation is different where provision for support of the wife, to continue after the husband's obligation to support is at an end, and to be paid after the husband's death out of his estate, is accepted in lieu of all other claim or provision for the support. Then the stipulated provision for the support of the wife from her husband's estate takes the place of the provision to which under the law of the state the wife would otherwise be entitled. Other construction of the language of the contract would be forced and unreasonable. *Cf.* Matter of Young v. Hicks, *supra;* Girard v. Girard, 29 N. M. 189, 221 P. 801, 35 A. L. R. 1493. The contract contemplates and provides for that situation after the husband's death, and should be construed accordingly."

The case of *Young v. Hicks,* 92 N. Y. 235, cited in *In re Burridge's Estate, supra,* involved an antenuptial agree-

ment, which provided that if, after marriage, the husband died first, the wife would accept $1500.00 "in full satisfaction of her dower in his estate," and the husband agreed to provide in his will for the payment of said sum "in lieu of dower, or her rights as his widow in his estate." After the husband's death the widow made claim to certain specific articles of property that, under the law, would be set apart to the family. But, the Court "held that the agreement was and remained in full force after marriage (*Laws of 1849,* Chap. 375, Sec. 3); that the intent was that the woman should take nothing as widow from her husband's estate; and that, therefore, there being no children living, the issue of such marriage, she was not entitled to the specific articles given by statute (*2 R. S.* 83, Sec. 9) to a widow; that, although not to be appraised, they were part of the estate, and she, by her agreement, was estopped from claiming them." (Syl. 1.)

From the above New York holdings we deduce the conclusion that a satisfaction of the wife's claim for support, without some further special covenant on her part, would not on the husband's demise affect her status as an heir at law to a share in his estate. But the character of his earnings during his lifetime is not changed from separate to community property wherever his domicile. She would have only the right of a widow in his separate estate under the law of succession in the state of his domicile.

The Fourteenth Amendment of the Constitution of the United States Protects the Estate of William C. Fields Against the Community Property Claim of Hattie Fields.

The earnings of William C. Fields were his separate property when residing in New York, when residing in Pennsylvania and when residing in New Jersey. This right was unrestricted except for the duty to support Hattie Fields therefrom. This duty on his part was reduced to a concrete form of agreement between them. So long as his covenants under the contract were kept and performed by him, these earnings remained his separate property. He performed the covenants on his part until death, and, therefore, his earnings remained his separate estate. Change of domicile to California neither relieved him of the burdens, nor withdrew the benefits of the New York agreement.

For approximately 20 years prior to the death of the decedent, he performed his part of the agreement through two banks in New York City, the Harriman Bank and Trust Company and the Guaranty Trust Company. The latter continuously from the year 1933 until the date of his death. The contract was thus made and performed throughout the life of the decedent in New York. The duty of William C. Fields to support Hattie Fields thus rested upon a New York contract. The effect of the performance of this contract on his part was to satisfy all rights of the wife in his future earnings. The fact that

he became a resident of California and died here does not alter the situation. The principle governing this situation is announced in the following cases

Hartford Acc. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143;

Home Insurance Co. v. Dick, 281 U. S. 397.

Therefore, California is without power under the due process provision of the Fourteenth Amendment to change the effect of the terms of this agreement.

In California the Spouses May Freely Contract With Each Other in Respect to Their Earnings and Personal Property Whether the Same Be Separate or Community Property.

Civil Code, Secs. 158, 159.

The cases so holding are too numerous for citation. Moreover, the rule is too well established to need citation of authority.

The right of the spouses to contract with each other extends to and includes a written agreement, or an executed oral agreement, transmuting the character of the property held by them, and such an agreement will be given effect by law.

Yoakam v. Kingery, 126 Cal. 30;

Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712;

Kenney v. Kenney, 220 Cal. 134;

Siberell v. Siberell, 214 Cal. 767;

Thomas v. Hoffman, 122 Cal. App. 213;

Estate of Sill, 121 Cal. App. 202;
Estate of Wahlefeld, 105 Cal. App. 770;
Estate of Henderson, 128 Cal. App. 397;
Schipper v. Penkalski, 46 Cal. App. 2d 28.

The rule is stated in *Siberell v. Siberell,* 214 Cal. 767, at page 770, as follows:

> "Under sections 158 and 159 of the Civil Code, it is now well settled that husband and wife may, as between themselves, enter into any contract respecting property which either might, if unmarried. Under this plenary authority, the separate property of each may be converted into community property and the community property of both may likewise be converted into separate property of both or either. (Perkins v. Sunset Tel. etc. Co., 155 Cal. 712, 719, 720 (103 Pac. 190), and cases there cited.)"

In *Schipper v. Penkalski,* 46 Cal. App. 2d 28, the Court said, at page 32:

> "Husband and wife may, by a written agreement or by an executed oral agreement, transmute the character of the property held by them and such agreement will be given effect by law. (Citing cases.)"

The rule is stated broadly in many California cases, including those cases cited, *supra,* and would seem to include any form of property, other than real property, in an oral contract between the spouses, and especially where, as here, such contract is fully executed.

Either Spouse May Release or Relinquish His or Her Rights and Claims to the Earnings and Personal Property of the Other, and Such Relinquishment May Be Established by Circumstantial Evidence.

The case of *O'Bryan v. Commissioners of Internal Revenue,* 148 F. 2d 456, seems much in point here, and deserves special consideration. It considers a separation agreement made after the community property right had arisen, although husband and wife separated while living in New York, he removed to California in 1932, and the separation agreement was made in 1935 or 1936 thereafter.

The pertinent provisions of the agreement were as follows (148 F. 2d 456, at 458)

> "The parties shall live separate and apart and each be free from interference, authority and control by the other as fully as if he or she were sole and unmarried, and each may conduct, carry on and engage in any employment, business or trade which to him or her shall seem advisable for his or her own, sole or separate use and benefit without and free from any control, restraint or interference, direct or indirect, by the other party in all respects as if each were unmarried."

The contract differs in legal effect but little from the case at bar. It does not pretend to dispose of existing community property. It only serves to affect the character of the future earnings of the husband. This Court holds that the husband's earnings in California are his separate property. The Court treated it as a California contract under Civil Code Sections 158, 159. How much stronger must be a case where the agreement is executed in a common law state where support is the only right of

a wife in such state. In other words, the contract here satisfies fully the law of the state where executed. A vested right in all his own future earnings arose immediately on the execution of such contract. That is true even if it was no more than a crystalization or implementation of her right to support. If the husband moves into a community property state the character of his earnings does not and could not lawfully change. The Fourteenth Amendment of the Constitution of the United States guarantees him equal protection with all other citizens in his property rights. See also:

Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719;

Estate of Patterson, 46 Cal. App. 415, 421.

These two cases directly decide that relinquishment may be shown by circumstances. Many other California cases, by necessary implication, or by analogy, hold to the same effect. Indeed, it would be a departure from the general rule applicable to implied contracts to hold otherwise.

In *Perkins v. Sunset Tel. & Tel. Co.,* 155 Cal. 712, *supra,* the Court said at pages 719, 720:

> "Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property, whereby one may release to the other all interest, *both present and in expectancy.* (Citing numerous cases.) It will be seen by an examination of the authorities cited above that the utmost freedom of contract exists in California between husband and wife and that *the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence or non-existence of a*

contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it. In the case at bar there was both positive evidence and also testimony as to facts and circumstances tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been the community property, was, and had been in existence for a long period of years." (Italics ours.)

The above quoted language was quoted with approval in *Estate of Patterson,* 46 Cal. App. 415, at page 421, the Court emphasizing that part of the holding in the *Perkins* case, *"that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses,"* etc. (Italics the Court's.)

The separation and the conduct of Mr. and Mrs. Fields, over a period of almost forty years, are strong circumstances showing that some kind of an agreement existed between them in respect to his earnings, and personal property acquired therewith, and likewise that her acceptance of $60.00 per week for life involved a relinquishment of all rights to his earnings over and above said sum. Other circumstances, consisting of letters between the parties, or their authorized attorneys and agents, should also be admissible under the rule, both to establish the existence of the contract and the terms and provisions thereof.

It is interesting to note the following comment of the Court in *Estate of Patterson,* 46 Cal. App. 415, *supra,* in

respect to the validity and sufficiency, in law, of such an oral contract (*id.*, p. 420):

> "Nor have we been able to find any provision in our law requiring an agreement between a husband and wife whereby the one relinquishes to the other his or her inheritable interest in his or her estate shall, to be valid or of binding force, be in writing; and counsel for the appellant frankly say that, after considerable research, they have not succeeded in finding any California cases holding it to be the rule that such an engagement between husband and wife must be reduced to writing to be valid and enforceable."

It may also be noted that, under California law, no consideration is necessary to support an agreement, written or oral, that one spouse relinquishes his or her rights to the earnings or personal property of the other. The mutual consent of the spouses is sufficient consideration for such a contract.

Wren v. Wren, 100 Cal. 276;
Kaltschmidt v. Weber, 145 Cal. 596;
Helvering v. Hickman (9 Cir.), 70 F. 2d 985.

Cf.:

Doxsee Co. v. All Persons, 3 Cal. 2d 609.

To the same effect see also the recent case of *Faust v. Faust,* 91 A. C. A., Vol. 3, p. 333 (204 P. 2d 906).

Declarations of William C. Fields—Admissibility to Prove the Oral Agreement With Harriet V. Fields and Terms Thereof.

It must be conceded to be the general rule in California that self-serving declarations of a spouse are inadmissible upon an issue as to whether property is community or separate. Under this rule it has been held that the following specific declarations are incompetent: (1) Declaration in a will that property devised is the testator's; (2) like statements in the inventory and appraisement; (3) statements of wife, at time of purchase of property, that it was being bought for her separate property; and (4) allegations in husband's divorce complaint of non-existence of community property. (3 *Cal. Jur. Ten-Year Supp.*, pp. 572, 573, and cases cited.) There may also be others.

On the other hand, declarations against interest of a deceased spouse are admissible against those claiming under him, thus showing at least one exception to the general rule.

The declarations and statements of William C. Fields as to why he was currently paying $60.00 per week to Mrs. Fields, and why such payments continued for nearly 40 years, should also constitute an exception to the general rule. Such declarations, considered in connection with the separation of the spouses and payments by him to her aggregating more than $100,000.00 over a period of 40 years, would tend to show his intent in making such payments, and, in turn, such intent would disclose the existence of the contract requiring the making of said

payments. This should be sufficient to bring the alleged declarations of William C. Fields within the exceptions to the general rule excluding self-serving declarations of a decedent unless made against interest.

It is a settled rule of law in this State that when intent is a material element of a disputed fact the declarations of a decedent as to his intent in respect to such fact are admissible.

Whitlow v. Durst, 20 Cal. 2d 523;
Hansen v. Bear Film Co. Inc., 28 Cal. 2d 154;
Dineen v. Younger, 57 Cal. App. 2d 200;
Katz v. Enos, 68 Cal. App. 2d 266.

Conclusion.

Upon the foregoing facts and the authorities applicable thereto, we submit that no community property right ever existed in the earnings of William C. Fields while domiciled in California.

Respectfully submitted,

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